89-1921

No. _____

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANTHONY J. VARCA and
MARK A. VARCA
Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a district judge conduct an inquiry of counsel regarding conflicts of interest or a Garcia hearing where criminal defendants have repeatedly made the court aware of their counsels' unacceptable conflicts in advance of trial and have requested that the trial court conduct such an inquiry and Garcia hearing?

2. Does the plain language and legislative history of 18 U.S.C. Section 4205 permit a court to designate a minimum length of sentence greater than ten (10) years before a prisoner is eligible for parole?

The Circuit Courts of Appeal are divided on this issue - four Circuits have held that a court may not designate minimum parole eligibility dates beyond ten (10) years and five Circuits have held to the contrary.

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Anthony J. Varca and his son Mark A. Varca, defendants and appellants in the courts below, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 7, 1990.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported as follows: United States v. Mark A. Varca and Anthony J. Varca, 896 F.2d 900 (5th Cir. 1990). A copy of the Opinion is attached in the Appendix hereto (hereinafter "Pet. App.") at 1. The unpublished Order denying the Petition For Rehearing and Suggestion For Rehearing En Banc was entered on April 4, 1990. See Pet. App. at 22.

The judgments and sentences of the United States District Court, Eastern District of Louisiana, were entered on December 14, 1988. See Pet. App. at 24. The trial court did not issue a written opinion on the conflicts of interest issues and motions raised before it.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 7, 1990. See Pet. App. at 1. A timely Petition For Rehearing and a Suggestion For Rehearing En Banc were denied on April 4, 1990. See Pet. App. at 22. The jurisdiction of this Court to review the judgment of the Fifth Circuit is conferred under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

18 U.S.C. Sections 4205(a) and (b)

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on

parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

STATEMENT OF THE CASE

A. Introduction

This case raises two important issues of national scope that have divided the Circuit Courts of Appeal.

1. Anthony and Mark Varca's attorneys, Arthur Lemann and the law firm of Glass & Reed, concurrently represented Customs

officials in a prior companion indictment involving the same set of facts and the same criminal conduct later charged against the Varcas. The Varcas asked their counsel to pursue a defense that would show that corrupt Customs officials collaborated in smuggling marijuana into Louisiana under cover of the Varcas' legitimate shipping operations and without the Varcas' knowledge. Such a defense would necessarily involve discrediting and implicating Lemann and Reed's other clients but was not pursued because of the conflicts of interest.

The Varcas personally made the trial court aware of these impermissible conflicts repeatedly before and during trial and specifically asked the trial court to conduct a hearing pursuant to United States v. Garcia, 517 F.2d 272 (5th Cir. 1975)[1] and an inquiry

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[1]At a Garcia hearing the court explains in detail the constitutional right to be represented by counsel that is not laboring under a conflict of interests and elicits from the defendant whether he wishes to waive

(continued...)

of counsel as to the conflicts. Notwithstanding these requests, and the fact that the Varcas' attorneys never offered the trial court any information on the conflicts of interest, the trial court failed to conduct a Garcia hearing or to inquire of the attorneys as to the conflicts.

Under these circumstances, and any time a trial court is expressly made aware of a conflict of interests, a defendant "must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." Cuyler v. Sullivan, 446 U.S. 333, 348 (1980) (emphasis added). The trial court's failure to inquire of counsel as to the conflicts improperly denied the Varcas this opportunity in direct contravention of Cuyler. The Fifth Circuit, in affirming the trial court's fundamental error, engaged in

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[1](...continued)
the right to conflict-free counsel. The Garcia hearing has become a bedrock in criminal trials.

speculation as to whether actual conflicts of interest existed and to what extent such conflicts affected the Varcas' defense. Such speculation, in the absence of any inquiry of counsel or Garcia hearing at the trial court level, has never been countenanced by any court and is directly at odds with the settled precedents of this Court. This Petition should be granted so that this Court can correct the dangerous precedent set by the Fifth Circuit.

2. The trial court sentenced the Varcas each to a term of imprisonment of fifty-two years and ordered, pursuant to 18 U.S.C. § 4205(b)(1), that they serve a minimum of fifteen years in prison before they could be eligible for parole. Petitioners contend that the plain language and legislative history of 18 U.S.C. Sections 4205(a) and (b) prevent a trial court from designating a minimum length of sentence greater than ten years before a prisoner is eligible for

parole. The issue of whether courts can set minimum parole eligibility dates beyond ten years has been hotly contested and the Circuit Courts of Appeal are split five to four on this issue. This Petition should be granted so that this Court can resolve a major sentencing issue and provide badly needed guidance to those sharply divided Courts of Appeal.

B. Proceedings Below

On September 29, 1987, the Petitioners, Anthony J. Varca and his son Mark A. Varca, along with nine (9) other co-defendants, were indicted and charged with complicity in smuggling marijuana.[2] On September 14-16, 1988, the Varcas were tried together with no other co-defendants by jury before the

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[2]The indictment charged (1) conspiracy to import marijuana; (2) attempt to import marijuana; (3) conspiracy to possess with intent to distribute marijuana; and (4) possession with intent to distribute marijuana, in violation of Titles 18 and 21 of the United States Code.

Honorable A.J. McNamara in the Eastern District of Louisiana. On September 16, 1988, the jury returned verdicts of guilty against the Varcas and the court later sentenced both Anthony and Mark Varca to a term of imprisonment of fifty-two (52) years. The trial court sentenced the Varcas pursuant to 18 U.S.C. § 4205(b)(1) and ordered that the Varcas serve a minimum of fifteen (15) years in prison before they could be eligible for parole. See Pet.App. at 24-25, 26-27.

The Varcas appealed their convictions and fully briefed several issues. On March 7, 1990, the Fifth Circuit issued an opinion affirming the Varcas' convictions and held, inter alia, that 1) the trial court did not abuse its discretion in its failure to conduct a Garcia hearing or an inquiry of the Varcas' attorneys as to conflicts of interest that the Varcas expressly made the trial court aware of in advance of trial; and 2) the trial court did not err in setting minimum parole

eligibility dates greater than ten (10) years. See Pet.App. at 1. This Petition timely followed.

C. Statement of Facts

1. The Varcas Hired Attorneys Arthur A. Lemann and John W. Reed

On December 28, 1987, Arthur A. Lemann entered a formal appearance on behalf of Anthony Varca. On the same day, Robert Glass and the law firm Glass & Reed entered a formal appearance on behalf of Mark Varca.[3] John Reed, a partner of Robert Glass in the law firm Glass & Reed, became principal counsel

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[3] The Varcas hired Lemann and Reed after the Varcas' first counsel of choice, James J. O'Connor, was disqualified by the trial court following a full Garcia - conflicts hearing. O'Connor previously represented two individuals that had been convicted in the prior Fink indictment discussed below and the government indicated that it would call these two individuals as witnesses at trial. For this reason, and because the Varcas did not wish to waive their right to conflict-free counsel, the trial court disqualified O'Connor. Lemann and Reed had not been retained at this point and thus, Lemann's and Reed's conflicts were not known and not discussed at the Garcia conflicts hearing involving O'Connor.

for Mark Varca before and during trial. Mr. Lemann and the law firm of Glass & Reed represented the Varcas from December 28, 1987, through trial, which ended on September 16, 1988.[4]

2. The Companion Indictments of Fink and Customs Officials

On or about August 29, 1985, Randy Scott Fink, former Customs Officer Samuel Edwards and 19 others were arrested and/or charged in a four-count indictment in the Eastern District of Louisiana in Case No. 85-321. On October 10, 1985, the government filed a superseding indictment charging Customs officials Keith Deerman and Francis Kinney, along with two others, with the same offenses. The charges in the Fink case arise from the same set of facts, involve the identical ships and load of marijuana and the very same

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[4] After the Varcas' trial Mr. Reed and Mr. Lemann were excused by the trial court from any further representation.

smuggling conspiracy that the government later charged against the Varcas.

3. **The Deerman and Kinney Conflicts**

The Varcas' attorneys, Lemann and Reed, and partners of the Varcas' attorneys, represented defendants in the companion Fink case and were still involved in that representation up to and through the Varcas' trial. Mr. Lemann represented former Customs official Keith Deerman from the outset of his indictment in 1985. At some point after the first trial of Deerman and Kinney, which took place on January 13, 1986, Robert Glass of the law firm Glass & Reed began representing Francis Kinney.[5] Deerman and Kinney were convicted on two of four counts at their first

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[5] Deerman and Kinney both testified at their trial that they had no knowledge of or involvement in the marijuana conspiracy. The jury acquitted Deerman and Kinney on two counts and failed to agree on two other counts. The Government filed a second superseding indictment against Deerman and Kinney on March 11, 1986.

trial and Lemann and Glass represented them unsuccessfully on appeal.[6] At the time of the Varcas' trial in September of 1988, Lemann and Glass were still representing Deerman and Kinney, whose second trial was then pending.[7] Thus, Mr. Lemann and Mr. Reed's partner, Robert Glass, were counsel for the very set of Customs officials whom Anthony and Mark Varca wanted to point a finger at as part of their defense.

The Varcas came to perceive that their attorneys' concurrent representation of these Customs officials created unacceptable conflicts of interest. The Varcas wanted counsel to employ a defense strategy that would explore and demonstrate that corrupt Customs officials duped the Varcas by conspiring with Fink and others to smuggle

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[6] See United States v. Deerman, 837 F.2d 784 (5th Cir. February 17, 1988).

[7] Deerman and Kinney's second trial began on April 4, 1989 and the jury found them guilty. They were sentenced to 18 years each in prison.

marijuana using the Varcas' legitimate shipping operations. The Varcas' counsel never investigated this defense, never served the necessary subpoenas and never presented the defense in any detail at trial.

4. The Varcas Personally Made The Trial Court Aware of The Impermissible Deerman and Kinney Conflicts

Desperate to resolve the nascent conflicts of interest, the Varcas took it upon themselves to complain to the trial court.[8]

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[8] By this time the attorney-client relationship had completely broken down. After the attorneys said that a large retainer which the Varcas had paid was exhausted, Lemann and Reed moved to withdraw on April, 5, 1988. In support of their Motion to Withdraw Lemann and Reed submitted an affidavit ex-parte and under seal. In their affidavit, Lemann and Reed detailed the total breakdown in the attorney-client relationship. After conducting a hearing on Lemann and Reed's Motion to Withdraw on April 11, 1988, the trial court denied this Motion.

The April hearing also indicates that the Varcas were aware that their attorneys had previously represented corrupt Customs officials at another trial because Tony Varca stated that he "picked him [Lemann] from reading all the transcripts [of Deerman and Kinney's first trial]." The Varcas were not yet aware, however, that their attorneys would not or could not pursue a defense

(continued...)

On September 12, 1988 at a pre-trial hearing[9] both Mark and Anthony Varca advised the trial court of their dissatisfaction with their attorneys' simultaneous representation of Customs officials Deerman and Kinney.[10] The record clearly reflects that Mark Varca said:

> I know we have a tremendous conflict with counsel over the Customs agents being their

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[8](...continued)
of the Varcas which pivoted on attacking and discrediting Deerman, Kinney and the other Customs agents. No conflicts of interest issues were discussed at the April hearing, although the trial court might well have raised a question at that time.

[9] This pre-trial hearing was the first opportunity that the Varcas had to personally present the impermissible conflicts of interest to the trial court. The last time the Varcas were personally before the trial court was in June of 1988.

[10] Although this was the first time the Varcas advised the trial court of the conflicts of interest, the trial court was aware as of December of 1987 that attorney Lemann represented Deerman. At a hearing on December 16, 1987, concerning another potential conflict raised on appeal but not at issue herein, Mr. Lemann informed the trial court that he represented Deerman and had asked another attorney if his client had any information on Deerman (R11-10). The trial court did not make any inquiry of Mr. Lemann about his representation of Deerman and never conducted a Garcia hearing to determine the existence of a conflict and the possible waiver thereof by the Varcas.

> clients, too. Counsel feel they don't have one. We feel we have one. But, I get stonewalled every time I try to explore that through the defense.

(R13-5).[11] Anthony Varca added:

> We have a conflict with counsel, as my son stated . . because every time we go into the Customs matter, the Customs [officials] being subpoenaed, it's stonewalled and we don't get that.

(R13-9).

Despite these unambiguous and direct pleas, the trial court made no inquiry of counsel or the Varcas as to the existence or extent of the conflicts due to Lemann and Glass's representation of Deerman and Kinney. Moreover, the Varcas' counsel did not offer any information to the trial court relating to the conflicts.

Mark Varca himself moved ore tenus before trial on September 14, 1988 to disqualify counsel due to conflicts of interest or alternatively, to conduct an

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[11] This is a citation to the record below and designates the appropriate volume and page number of the transcript.

evidentiary hearing where the trial court would make inquiry of the attorneys directly (R19-5,6). Mark Varca informed the trial court that counsel were afraid to contradict their Customs clients while representing the Varcas. In addition, Mark Varca described in detail to the trial court the nature of the conflicts (R19-5, et seq.).[12] Lemann and Reed declined to comment on the conflicts of interest.

The trial court orally denied the Varcas' motion to conduct an inquiry of counsel as to the conflicts of interest and immediately commenced trial with the conflicted Lemann and Reed representing the

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[12] Basically, the Varcas had requested of their attorneys that they pursue a defense that would show that corrupt Customs officials collaborated with Fink and others in smuggling marijuana into New Orleans taking advantage of the Varcas' legitimate shipping operations and without the Varcas' knowledge. Mark Varca explained that this defense would necessarily require discrediting Deerman and Kinney and that this line of defense "would require an activity on the part of our attorneys in conflict with their efforts on behalf of their Customs clients" (R19-8).

Varcas (R19-22).[13] The trial court never inquired of counsel as to the nature of the conflicts and also failed to conduct a Garcia-type inquiry of the Varcas to determine if they would waive the conflicts. Indeed, the only response by the trial court to the conflict issue was to ask the Varcas if they wished to proceed immediately to trial pro se (R19-5,12,13). The Varcas quite reasonably responded that they did not have the ability to represent themselves.[14]

The Varcas filed a post-trial motion for a new trial on November 4, 1988, through

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[13]The trial court also denied the Varcas' subsequent ore tenus motion for a continuance of trial so that they could find new attorneys and properly prepare their defense (R19-18).

[14]Mark Varca raised the conflicts of interest issue again during trial at the conclusion of the Government's case (R18-492 et seq.). In fact, in response to the trial court's question of whether Mark Varca still desired to be represented by counsel, Mark Varca said he wanted to dismiss counsel. The trial court's only response was to ask if Mark Varca wanted to represent himself. Mark Varca stated that he did not have the ability. Again, the trial court did not conduct a conflicts inquiry.

undersigned counsel, wherein they set forth the issue relating to Lemann and Reed's conflicts of interest. Once more, the trial court failed to hold a Garcia hearing or make any inquiry of counsel as to the conflicts. The trial court did, however, properly conduct a full Garcia hearing on October 12, 1988 with respect only to the undersigned to insure that the Varcas received conflict-free representation at the post-verdict stage of the case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS MANDATED THAT A TRIAL COURT MADE AWARE OF A CONFLICT OF INTERESTS MUST INQUIRE INTO THE CONFLICT AND CONDUCT A GARCIA HEARING

A. The Trial Court Was Expressly Made Aware Of The Conflicts Of Interest In Advance Of Trial

At a pre-trial hearing on September 12, 1988, the first time the Varcas were present before the trial court since June 21, 1988, the Varcas informed the trial court that their

attorneys' concurrent representation of Customs officials, charged in a prior companion indictment involving the same set of facts and same alleged criminal conduct later charged against the Varcas, created unacceptable conflicts of interest.[15] The Varcas had asked that their attorneys to pursue a defense that would involve discrediting Customs officials. The Varcas further informed the trial court that they wished to subpoena Customs officials as witnesses, including Deerman and Kinney, in order to demonstrate the Varcas' lack of involvement in the marijuana conspiracy. The conflicts obviously made such a defense impossible. Notwithstanding the Varcas' requests, the trial court did not inquire of Lemann and Reed as to the existence and extent of any conflicts and the attorneys did not

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[15] As detailed in note 10, the trial court was aware as of December 16, 1987 that Lemann represented corrupt Customs official Deerman.

offer any information concerning the conflicts.

Desperate to resolve the problems with conflicts, Mark Varca himself moved ore tenus just before trial to disqualify counsel due to conflicts of interest or to hold an evidentiary hearing wherein the trial court would make inquiry of the attorneys directly. Again, Mark Varca explained the nature of the

conflicts to the trial court explicitly.[16] The trial court's questioning of the Varcas as to whether they wished to proceed to trial pro se constituted a hollow offer. The Varcas were not physically, emotionally or by education capable of conducting their own legal defense and Mark Varca so informed the trial court. The trial court should have conducted a Garcia hearing and should not have

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[16]As part of their defense and in an effort to establish that they were at most unwilling participants in a criminal scheme, the Varcas wanted to attack the conduct of the Customs officials and the involvement of these people with Fink. One tactic available to this defense would have entailed, for example, subpoenaing Customs officials to trial and questioning them as to what they knew of the Varcas. It does not matter that Reed and Lemann ultimately chose not to call Deerman and Kinney as witnesses at the Varcas' trial. See Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962). The taint of the conflicts also inhibited the Varcas' counsel from subpoenaing other Customs officials and effectively cross-examining Government witnesses with respect to the involvement of Customs officials. In the evaluation of whether to pursue strategies contrary to the interests of Deerman and Kinney (who had yet to be tried the second time), the Varcas obviously would have been better represented by attorneys who were not constrained by the possibility that taking such action would impair the defense of Deerman and Kinney.

forced the Varcas to go to trial with counsel who were laboring under unacceptable conflicts of interest.[17]

B. Once Made Aware Of Conflicts Of Interest The Trial Court Must Inquire Into The Conflicts And Conduct A Garcia Hearing

In exercising his supervisory power, a trial judge must ensure that trial is conducted with "solicitude for the essential rights of the accused." Holloway v. Arkansas, 435 U.S. 475,484 (1978), quoting Glasser v. United States, 315 U.S. 60 (1942). If "'[t]he possibility of the inconsistent interests of [the clients] is brought home to the court,' by means of an objection at trial, the court may not require joint representation." Cuyler

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[17] The trial court's treatment of Lemann and Reed's conflicts is exacerbated by the early trial court ruling disqualifying their counsel of choice, James O'Connor, due to conflict. In addition, since the trial court did conduct Garcia hearings as to James O'Connor and as to undersigned counsel, the trial court was obviously aware of the proper procedures to follow and its failure to so act as to Reed and Lemann is particularly troubling.

v. Sullivan, 446 U.S. 335,356 (1980), quoting Glasser, 315 U.S. at 71. "[S]ince a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation **must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial**." Id. at 348 (emphasis added). In addition, this Court has held that where the record demonstrates that there is a "possibility of a conflict of interest," the trial court has a duty to inquire further into the conflicts issues. Wood v. Georgia, 450 U.S. 261,272 (1981) (emphasis added).

By not inquiring of the attorneys directly and conducting a Garcia or similar conflicts hearing, the trial court improperly denied the Varcas this opportunity and forced them to go to trial with attorneys laboring under conflicts of interest. The Fifth Circuit's affirmance of the trial court's

error is in direct contravention of Cuyler, Holloway and Wood.

Moreover, although the facts of Cuyler are not similar, Cuyler's mandate is clear. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Id. at 347. Conversely, where a trial court is expressly made aware of a potential conflict,[18] it has no discretion not to conduct an inquiry. In addition, where the trial court knows of a conflict and fails to conduct an inquiry, a reviewing court can presume that there was ineffective assistance of counsel.[19]

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[18] Defense counsel were also obviously aware of the troubling conflicts at work herein. In addition, the trial attorney for the Government in this case was aware of the conflict problems because he tried the companion Fink case. The failure of the Government and of defense counsel to do more than they did, however, does not excuse the trial court's failure to fulfill its obligations.

[19] See Cuyler, 446 U.S. at 348 ("unless the trial court fails to afford such an opportunity [to show a potential conflict is impermissible], a reviewing court cannot presume that the possibility of conflict has resulted in ineffective assistance of counsel").

Furthermore, the opinion below directly contravenes the dictates of Holloway v. Arkansas, 435 U.S. 475 (1978). In Holloway, an attorney representing three co-defendants in a criminal trial asked the trial court in advance of trial to appoint separate counsel. The trial court denied these requests and "cut off any opportunity of defense counsel to do more than make conclusory representations" with respect to probable conflicts of interest. Id. at 484 n.7. This Court in Holloway reversed the defendants' convictions and noted that the trial court "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." Id. at 484.

Moreover, this Court rightly presumed prejudice to the defendants and reversed because a "rule requiring a defendant to show that a conflict of interests - which he and his counsel tried to avoid by timely

objections to the joint representation - prejudiced him in some specific fashion would not be susceptible of intelligent evenhanded application." Id. at 490. In this case, as in Holloway, the trial court improperly failed to conduct an evidentiary inquiry into conflicts brought to the attention of the trial court in advance of trial.

The Fifth Circuit's decision below also conflicts with numerous other Circuit Court opinions, including those in the Fifth Circuit itself. For example, in contrast to this case the court in United States v. Punch, 722 F.2d 146 (5th Cir. 1983) properly followed the dictates of this Court's decisions in Cuyler and Holloway. In Punch, an attorney was retained to represent co-indictees with potentially antagonistic defenses (entrapment and non-involvement). Defense counsel repeatedly asked the court to hold a Garcia hearing and also asked to withdraw as defendant's counsel. The trial court failed

to respond to any of her requests. The Fifth Circuit reversed Punch's conviction, finding that the district court did not take "adequate steps to ascertain whether the risk [of conflict] was too remote to warrant separate counsel." Punch, 722 F.2d at 151, quoting Holloway v. Arkansas, 435 U.S. 475,484 (1978).[20] See also Brooks v. Hopper, 597 F.2d 57,59 (5th Cir. 1979)(where three defendants represented by one attorney at trial and potential conflicts of interest issues surface at trial, trial court has a "duty at least to make inquiry whether counsel is able to

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[20] The court also stated in Punch that:

> because joint representation of criminal defendants is so fraught with potential conflicts, the trial court must be ever vigilant with regard to any sign of conflict to safeguard the accused's right to effective assistance of counsel. When a trial court ignores or refuses to consider properly a counsel's claim of conflict of interest, considerable danger exists that sixth amendment rights will be violated.

Id. at 151.

proceed further without" compromising rights of defendants).

Indeed, the Fifth Circuit's opinion below is at odds not only with the settled precedents of this Court and those of the Fifth Circuit itself, but the decision below violates the mandate of all conflicts cases in all lower courts. See, e.g., Singley v. United States, 548 A.2d 780 (D.C. 1988); United States v. Ziegenhagen, 890 F.2d 937 (7th Cir. 1989); United States v. Lawriw, 568 F.2d 98 (8th Cir.), cert. denied 435 U.S. 969 (1978); Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir.), cert. denied 110 S.Ct. 203 (1989).

The trial court in this case, as in Holloway, Punch and Brooks, committed clear error and violated the mandates of this Court by refusing to conduct an inquiry of counsel and a Garcia-type hearing when made aware of conflicts of interest in advance of trial.

C. The Varcas Timely Made The Trial Court Aware Of The Conflicts Of Interest

The Fifth Circuit's decision below opines that the conflicts issue was an "eleventh hour tactic" and an "effort to delay the trial." See Pet. App. at 14. However, what the opinion fails to point out is that the September 12, 1988 pre-trial hearing, at which the Varcas first personally detailed to the trial court the conflicts of interest, was the first time since June of 1988 that the Varcas were before the trial court. In addition, the fact is that the trial court was made aware of the conflicts in advance of trial and it is never too late to bring to light conflicts of interest.[21] Eleventh hour or not, when a potential conflict is brought to the attention of a trial court in advance of trial, Cuyler, Holloway and Wood mandate

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[21] See e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980)(conflict raised for first time in collateral proceedings after state court affirmed conviction).

that the trial court conduct an inquiry of counsel and a Garcia hearing at that time.

D. The Fifth Circuit's Decision Directly Conflicts With The Mandates of This Court And Sets A Dangerous Precedent

The Fifth Circuit's opinion below is particularly troublesome in that it does not even cite Cuyler v. Sullivan, 446 U.S. 333 (1980), or acknowledge in any way this Court's requirement that when a conflict is brought to the attention of the trial court, the trial court must inquire as to the conflict. Id. at 348. Instead, the opinion skirts this fundamental issue and engages in sheer speculation regarding the underlying and undeveloped facts. It is to avoid this kind of baseless speculation that Cuyler, Holloway, Wood, Punch, Brooks and Garcia, and all other conflicts cases, mandate that Garcia-type inquiries and hearings take place.

The Fifth Circuit opinion states that "[a]ware of the professional reputation of Lemann and Reed, the district court was not persuaded that these attorneys labored under an irreconcilable conflict of interest." See Pet. App. at 12. The record, however, does not tell us this, and the trial court, and then the Fifth Circuit, had to have arrived at this conclusion through an assumption that the failure of trial counsel to raise the issue meant there was not a conflict. No one knows why the attorneys were silent on the conflict issue.[22] Indeed, the courts below could not have known whether and to what extent actual conflicts of interest existed and whether and

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[22] The record is totally devoid of the attorneys' position on the conflicts of interest raised before the trial court by the Varcas. The failure of the trial court to ascertain from the attorneys the exact nature of the conflicts is a fundamental error and particularly egregious because an attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." United States v. Punch, 722 F.2d 146,151 (5th Cir. 1983), quoting Holloway v. Arkansas, 435 U.S. 475,485-86 (1978).

how the Varcas were adversely affected. This is so because the trial court did not do as it should have and no Garcia hearing occurred.

The Sixth Amendment right to the effective assistance of counsel requires the trial court to do more than guess and speculate as to the existence and adverse effects of conflicts brought before the trial court in advance of trial. The opinion below at its core stands for the dangerous proposition that where a trial court is expressly made aware of an attorney's conflict of interests in advance of trial, the trial court need not inquire into the conflict and may infer from the attorney's silence or his general reputation that no such conflict exists. Such a result is incredible and directly contravenes this Court's decisions. To avoid the very kind of prejudicial speculation, this Court in Cuyler and Holloway has mandated that a trial court must inquire into a conflict and conduct a Garcia hearing

where the existence of a potential conflict is brought before the trial court in advance of trial. In fact, an inquiry of counsel and a Garcia hearing is all that the trial court had to do to ensure fairness to the Varcas.[23]

II. THE TRIAL COURT EXCEEDED THE STATUTORY AUTHORITY OF 18 U.S.C. SECTION 4205 IN SETTING MINIMUM PAROLE ELIGIBILITY DATES BEYOND TEN YEARS

Petitioners contend that the language and legislative history of 18 U.S.C. Sections 4205(a) and (b) prevent a trial court from designating a minimum length of sentence greater than ten years before a prisoner is eligible for parole. The issue of whether

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[23]The two issues raised in this Petition are both worthy of Supreme Court review. There is, however, a possible alternative remedy to plenary review with respect to the conflicts of interest issue. This Court could, in the interests of judicial economy, grant certiorari, vacate the judgment below and immediately remand this case with instructions that the Fifth Circuit require the trial court to conduct a Garcia hearing and an inquiry of trial counsel as to the conflicts of interest. Such a remedy is an appropriate alternative here in order to bring the courts below into compliance with this Court's settled precedents.

courts can set minimum parole eligibility dates beyond ten years has been hotly contested and the Federal Circuit Courts of Appeal are split five to four on this issue. This Petition should be granted so that this Court can resolve a major sentencing issue and provide badly needed guidance to those sharply divided Courts of Appeal.

A. The Facts and Statutory Scheme

The trial court sentenced Anthony and Mark Varca each to fifty-two (52) years in prison. The trial court sentenced the Varcas pursuant to 18 U.S.C. § 4205(b)(1) and ordered that the Varcas each serve a minimum of fifteen (15) years before they shall be eligible for parole.[24]

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[24]The Parole Commission and Reorganization Act of 1976, codified at 18 U.S.C. § 4201, et seq., is applicable to the Varcas' case based on the relevant dates of the offense conduct, even though the statutory parole scheme was repealed by the Comprehensive Crime Control Act of 1984. Defendants whose offense conduct occurred after November 1, 1987 are now sentenced pursuant to the Federal Sentencing Guidelines.

Section 4205 of Title 18 of the United States Code governs the time of eligibility for release on parole. Section 4205(a) states that a prisoner shall be eligible for parole after serving one-third of a sentence or "after serving ten years of a life sentence or a sentence of over thirty years, except to the extent otherwise provided by law."[25] Although the Varcas' 15 year parole eligibility dates are less than one-third of their 52 year sentences, their parole eligibility dates exceed the ten year cap mandated by § 4205(a). The resolution of this issue requires, therefore, an interpretation of the relationship between §§ 4205(a) and (b), as well as the legislative history. These issues have caused considerable confusion and

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[25]Section 4205(b)(1) states that a trial court may designate a minimum term of imprisonment before the defendant is eligible for parole, which term "shall not be more than one-third of the maximum sentence imposed by the court." The entire text of 18 U.S.C. § 4205(a) and (b) is reprinted above at 3-4.

disagreement among the Circuit Courts of Appeal.

B. The Circuit Courts of Appeal Are Deeply Divided On the Parole Eligibility Issue

Nine Circuit Courts of Appeal have addressed the issue of whether a court may set a minimum parole eligibility date in excess of ten years. Four Circuits have held that, pursuant to 18 U.S.C. § 4205 and its legislative history, a court may not designate a minimum length of sentence greater than ten years before a prisoner is eligible for parole. See United States v. Hagen, 869 F.2d 277 (6th Cir.), cert. denied 109 S.Ct. 3228 (1989); United States v. DiPasquale, 859 F.2d 9 (3rd Cir. 1988); United States v. Castonguay, 843 F.2d 51 (1st Cir. 1988); United States v. Fountain, 840 F.2d 509 (7th Cir.), cert. denied 109 S.Ct. 533 (1988). Five Circuits, including the Fifth Circuit below, have held to the contrary. See United

States v. Varca, 896 F.2d 900 (5th Cir. 1990); United States v. Berry, 839 F.2d 1487 (11th Cir.), cert. denied, 109 S.Ct. 863 (1989); United States v. Gwaltney, 790 F.2d 1378 (9th Cir.), cert. denied 479 U.S. 1104 (1987); Rothgeb v. United States, 789 F.2d 647 (8th Cir.), cert. denied, 475 U.S. 1020 (1986); United States v. O'Driscoll, 761 F.2d 589 (10th Cir.), cert. denied, 106 S.Ct. 1207 (1986).[26]

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[26]The confusion that parole eligibility issues have caused is further underscored by opinions on related issues. Although the Ninth and Eleventh Circuits have authorized courts to set parole eligibility dates greater than ten years, they have ruled that where a defendant is sentenced to life in prison the court may not set a parole eligibility date beyond ten years. See United States v. Tidmore, 893 F.2d 1209 (11th Cir. 1990); United States v. Kinslow, 860 F.2d 963 (9th Cir.), cert. denied, 110 S.Ct. 96 (1989). The rulings are based on the premise that a life sentence is an unquantifiable term and there is no way to calculate, pursuant to Section 4205(b)(1), what one-third of "life" is. These two circuits now countenance the anomous result that a defendant with a life sentence is eligible for parole after ten years, while a defendant with a sentence of a long term of years could serve far in excess of ten years before being eligible for parole.

C. The Interpretation, Policy and Legislative History of 18 U.S.C. Section 4205

A fair reading of 18 U.S.C. §§ 4205(a) and (b), as well as the policy behind and extensive legislative history of § 4205, indicate that Congress passed § 4205 to give courts the option only to reduce to less than ten years the term to be served before becoming eligible for parole.

Section 4205 could admittedly be interpreted in more than one way. For example, the last clause of § 4205(a), "except to the extent otherwise provided by law," could be interpreted to provide an exception to the ten year limit set, and that § 4205(b)(1) could be such an exception. Such an interpretation creates an anomaly and could lead to inherently unfair results. The perpetrator of a heinous crime is "eligible for parole after 10 years because he receives a "mere" life sentence - while confederates

with lesser responsibility may receive life in prison without possibility of parole if the judge imposes, say, a 300 year sentence with a 100 year minimum under § 4205(b)(1)." See Fountain, 840 F.2d at 518. The legislative history, discussed below, indicates that Congress had contemplated and rejected such an incongruity and did not intend to allow courts to exceed the ten year cap on parole eligibility.

In 1913, "a federal prisoner serving a life term became eligible for parole after having served fifteen years, while a prisoner serving a sentence for a specific term of years became eligible for parole after serving one-third of that sentence." See Hagen, 869 F.2d at 279, discussing 37 Stat. 650 (1913). The statutory scheme thus created the very anomaly identified in Fountain. Offenders serving life sentences for heinous crimes became eligible for parole earlier than

prisoners sentenced to terms of incarceration greater than 45 years for less serious crimes.

Congress recognized this incongruity and in 1951 enacted 28 U.S.C. § 4202, which stated that a prisoner "may be released on parole after serving one-third of such term or terms or after serving 15 years of a life sentence or of a sentence of over forty-five years." Thus, between 1951 and 1958, offenders sentenced to any term of years greater than 45, regardless of how much greater, would not be eligible for parole before service of 15 years, and the courts lacked authority to modify such parole eligibility. This dilemma, as well as prevailing trends in criminal justice demanding indeterminate sentencing, led to enactment of a modified parole statute. See 72 Stat. 845-46 (August 25, 1958).

The Department of Justice made a strong plea for eliminating minimum eligibility for

parole.[27] The newly proposed legislation garnered support from the Administrative Office of the United States Courts on behalf of the Judicial Conference, which stated that "[t]his is a bill to authorize the court in sentencing a prisoner to fix an earlier date when the prisoner shall become eligible for parole." See Fountain, 840 F.2d at 521 (original emphasis). "The function of the new language [as enacted into law] was to move in the direction of indeterminate sentencing - that is, earlier eligibility for parole - at the judges' option, and not to create an option to restore the incongruity that had been eliminated seven years before." Id. at 522 (emphasis added).[28]

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[27] See, e.g., letter from Deputy Attorney General Lawrence E. Walsh to Senator James O. Eastland, 1958 U.S. Code Cong. & Admin. News at 3891.

[28] Congress revamped the parole system once again by enacting the Parole Commission and Reorganization Act of 1976, 18 U.S.C. § 4201, which recodified the 1958 Statute at 18 U.S.C. § 4205(b), but did not alter the substance or language of the relevant statute. The only significant change in the 1976 and 1958 legislation was the reduction from 15 to 10 years as

(continued...)

The legislative history[29] indicates, therefore, that the possibility of parole on a term of years being available later than parole on a life sentence, was expressly considered and eliminated in 1951. In 1958, Congress did not consider or mean to revive this possibility. Thus, Congress never intended that § 4205 would to allow a court to set a minimum parole eligibility date beyond ten years.[30]

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[28](...continued)
the minimum parole eligibility date for offenders serving sentences of 30 years to life.

[29]For a more extensive analysis of the legislative history of Section 4205, see supra United States v. Hagen, 869 F.2d 277 (6th Cir.), cert. denied, 109 S.Ct. 3228 (1989); United States v. DiPasquale, 859 F.2d 9 (3rd Cir. 1988); United States v. Castonguay, 843 F.2d 51 (1st Cir. 1988); and United States v. Fountain, 840 F.2d 509 (7th Cir.), cert. denied, 109 S.Ct. 533 (1988).

[30]This interpretation also comports with that of the Federal Judicial Center, which prepared a widely disseminated training manual that states, "[i]n the sentence, the judge may designate an earlier parole eligibility date or specify that the prisoner is immediately eligible. 18 U.S.C. § 4205(b)(1), (2)." See Patridge, The Sentencing Options of Federal District Judges at 3 (1985) (Revised Edition) (emphasis added).

D. **Policy Considerations**

The parole eligibility issue is extremely important to public policy given the widely disparate sentences that offenders could receive for identical crimes depending in which Circuit the offender is convicted. Moreover, the anomaly that Congress eliminated in 1951 has been revived by the judiciary in certain Circuits. That is, heinous criminal offenders receiving life or lengthy term of years sentences could be eligible for parole ahead of lesser offenders.

Notwithstanding that the Federal Sentencing Guidelines, which have abolished the parole system, now govern all criminal cases where the offense conduct occurred after November 1, 1987, the problems with Section 4205 are not likely to go away in the near future. The Government is constantly investigating and indicting cases where the events under scrutiny occurred a number of

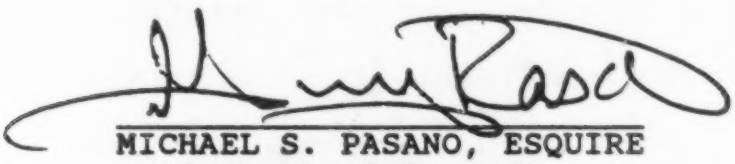
years ago. The sweep of RICO and conspiracy indictments are traditionally broad. In addition, "historical" indictments are likely to persist for some time given that the statute of limitations governing a variety of crimes relating to bank fraud has been extended from 5 to 10 years. See FIRREA, p.l. 101-73, 103 Stat. 183 at par. 930 (1989).

In short, the parole eligibility issue in this case presents this Court with the opportunity to resolve a major sentencing issue which will affect many criminal convictions and to provide badly needed guidance to the hopelessly fractured Circuit Courts of Appeal.

CONCLUSION

For all of the foregoing reasons, therefore, the Varcas respectfully submit that this Court should grant this Petition for Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of June, 1990 to The Solicitor General, Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; and to Patty Merkamp Stemler, Attorney, Criminal Division, Appellate Section, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899.

Guy A. Rasco, Esquire

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Mark A. VARCA and Anthony Joseph Varca, Defendants-Appellants.

No. 88-3942.

United States Court of Appeals,
Fifth Circuit.

March 7, 1990.

Guy Rasco, Michael S. Pasano, Miami, Fla., Zuckerman, Spaeder, Taylor & Evans, for defendants-appellants.

Patty Merkamp Stemler, Atty., Crim. Div., Appellate Section, Washington, D.C., John Volz, U.S. Atty., Harold J. Gilbert, Jr., Asst. U.S. Atty., New Orleans, La., Frank J. Marine, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, KING and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Anthony J. Varca and his son Mark A. Varca, together with nine co-defendants, were indicted in September 1987 for conspiracy to import marihuana, attempted importation of marihuana, conspiracy to possess marihuana with intent to distribute, and possession of marihuana with intent to distribute. Their indictment was one of several arising out of an elaborate drug smuggling operation in the Caribbean coordinated by one Randy Fink, which collapsed in August 1985 when agents seized over 25 tons of marihuana as it was being off-loaded onto a shrimp boat off the coast of Louisiana.

The cast of characters included Customs agents who suggested safe rendezvous points for the off-loading. The marihuana was transported in ships owned and manned by the Varcas. The Varcas denied knowledge of the

conspiracy and claimed involvement in CIA intelligence gathering and Contra-aid operations in the Caribbean which had been infiltrated and diverted to drug smuggling by Fink and others. Fink, who sought to lighten his burden by a measure of cooperation with the authorities, testified against the Varcas.

The Varcas were jointly tried but were represented by separate counsel. They were convicted on all four counts and each was sentenced to four consecutive 13-year prison terms, with a minimum of 15 years imprisonment before eligibility for parole, and a $500,000 fine. They timely appealed.

1. Ineffective assistance of counsel - conflicts of interest

The first and most serious issue raised by the Varcas is their contention that they were denied the effective assistance of counsel because their retained counsel had disabling conflicts of interest. They contend

that the trial court erred when it denied their motions to disqualify their attorneys, which they offered on the first day of the trial, without conducting a Garcia hearing.[1] Anthony Varca was represented by Arthur A. Lemann, III. Mark Varca was represented by John Wilson Reed.

Two bases of conflict are alleged. First, the Varcas assert that an attorney who had shared office space with Lemann had represented a defendant in one of the companion indictments who testified against them. Second, they assert that because Lemann and Robert Glass, Reed's law partner, concurrently represented two Customs agents named in one of the companion indictments, they refused to call those agents as witnesses for the Varcas and thus prejudiced their defense.

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[1] United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

A proper analysis of this claim requires a chronicling of the relationship between the Varcas and these two attorneys. When arrested in 1987 the Varcas jointly retained James O'Connor. The government informed O'Connor and the court that O'Connor had represented two co-conspirators, Thomas Ault and Robert Dillard, who might be called as witnesses for the prosecution. On December 7, 1987 a federal magistrate conducted a Garcia hearing, the potential conflict and the dangers inherent in that conflict were explained to the Varcas and they were informed of their right to conflict-free counsel. Neither wished to waive that right. The magistrate disqualified O'Connor and directed the Varcas to retain separate counsel.

Four days later Lemann informed the court that he had been asked to serve as counsel for one of the Varcas. At this meeting O'Connor advised that John Lawrence, an attorney who previously had shared office

space with Lemann, had represented Edward Misseck, a defendant in one of the related indictments. Another hearing was conducted in which the court questioned Lemann about his firm's former association with Lawrence. Lemann explained that Lawrence had been neither a partner nor an associate, that he had merely shared space for which he paid a portion of the office overhead. Fees were shared only when Lemann's firm referred a matter to Lawrence or when Lawrence referred a client to the firm. Lemann emphasized that although Lawrence had represented Misseck, he (Lemann) had not participated in, received fees from, or obtained confidential information regarding that representation. At most, Lemann informed the court, he had asked Lawrence to ask Misseck whether he knew anything about Keith Deerman, one of the indicted Customs agents whom Lemann represented. The trial court found no cause to disqualify Lemann.

About three months later Lemann and Reed jointly filed a motion asking to be relieved as counsel for the Varcas. They filed under seal an affidavit detailing their reasons for this request. Because of the seal we are not free to discuss the specifics of the affidavit, but we deem it relevant and important to note that it dealt with the retainer fee and Lemann and Reed related details therein which indicated that the Varcas lacked confidence in and rejected their professional advice.

After reading the affidavit the district judge held a hearing in chambers with Lemann, Reed and the Varcas present. The court elicited the position of the Varcas in light of this development. Anthony Varca stated that he had "no problems" with Lemann, whom he had selected after reading the transcript of one of the related trials in which Lemann and Robert Glass had represented Keith Deerman and Francis Kinney, the two Customs agents.

Anthony Varca opposed Lemann's withdrawal. Mark Varca opposed Reed's withdrawal. The court denied counsel's motion to withdraw.

Five months later and two days before the trial commenced, Mark Varca informed the court that he and his father had "a continuing battle" with counsel due to their concurrent representation of Deerman and Kinney.[2] Anthony Varca stated that the conflict had only become evident "in the last few days" and that every time they discussed issuing subpoenas to the agents they were "stonewalled" by counsel. They did not ask that counsel be disqualified. The court noted their objections.[3]

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[2]At the time of the Varcas' trial, Deerman and Kinney were awaiting retrial on a superseding indictment. In their first trial, the jury had acquitted them on two counts, but had hung on the other two. See United States v. Deerman, 837 F.2d 684 (5th Cir.) cert. denied, _____ U.S. _____, 109 S.Ct. 146, 102 L.Ed.2d 118 (1988).

[3]Mark Varca's son also wrote to the district judge complaining that the Varcas' counsel were concurrently representing Deerman and Kinney.

On the first day of trial, after the jury was sworn and jeopardy had attached the Varcas moved to disqualify Lemann and Reed, claiming that their counsel were afraid of "contradicting their Customs clients" and that they had "never disclosed [this] conflict." The Varcas requested an evidentiary hearing and a 90-day continuance to find new counsel and to prepare a defense. After hearing the Varcas' objections in full the trial judge offered them the option of continuing with their retained counsel or representing themselves, making it abundantly clear that the trial would proceed in either event. The Varcas declined the opportunity to represent themselves. Their motions[4] were denied and the trial proceeded.

[1] The Varcas first contend that Lemann should have been disqualified because

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[4]The Varcas also moved to dismiss their attorneys for providing ineffective assistance and to dismiss the indictment.

John Lawrence had represented Edward Misseck, a defendant in the companion Fink indictment and a witness against the Varcas.[5] This objection is devoid of merit. Early on Lemann candidly informed the court of his firm's relationship with Lawrence. That relationship was not a basis for disqualifying Lemann for it created no conflict of interest. While members and associates in one firm may not represent conflicting interests, practitioners who share office space and occasionally consult with one another are not regarded as constituting a single firm for conflict purposes. See Model Rules of Professional Conduct of the Louisiana State Bar Association 1.9 and 1.10, and parallel provisions in the ABA Model Rules of Professional Conduct. Compare Mitchell v. Maggio, 679 F.2d 77 (5th Cir.) cert. denied, 459 U.S. 912, 103 S.Ct. 222, 74 L.Ed.2d 176 (1982)(lawyers within one

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[5]This objection relates only to Lemann. Reed had no professional relationship with Lawrence.

firm). Nor was a basis for disqualification created by the factual relationship which existed between Lemann and Lawrence as a consequence of discussions or exchange of information.

The court and the Varcas were aware of the Lawrence matter. Just prior to selecting Lemann the Varcas had had a Garcia hearing in which the issue of conflict-free counsel was explained. The Varcas wanted O'Connor to continue with his joint representation of them but declined to waive conflict-free counsel. The court disqualified O'Connor over their objections.

[2] The Varcas' primary assertion is that the concurrent representation by Reed's partner and Lemann of the two Customs agents compromised their defense because their attorneys would not subpoena those agents in an attempt to prove that the smuggling had occurred without the Varcas' knowledge. They suggest that they only became aware of this

conflict a few days before trial. They assert that the district court's failure to inquire into the conflict, conduct a Garcia hearing, or grant a continuance, constitutes clear error warranting reversal of their convictions.

We begin this analysis by noting that after a Garcia hearing and a full explanation of the right to conflict-free counsel, and the dangers inherent in being represented by an attorney laboring under a conflict, the Varcas selected Lemann and Reed. They did so, according to their statements to the court, after reading a transcript of the trial of the two Customs agents who were represented by Lemann and Reed's law partner.

Aware of the professional reputation of Lemann and Reed, the district court was not persuaded that these attorneys had willfully labored under an irreconcilable conflict of interest. Nor are we. These attorneys previously had asked to be relieved; the court

had declined, deeming their reasons insufficient. If some development had occasioned a true conflict which warranted disqualification, it strains our credulity to believe that these attorneys would not cheerfully have brought this conflict to the court's attention and reurged their motion to withdraw.

We find even less credible the suggestion of the Varcas that this conflict reared its ugly head only on the eve of trial, as they began to explore a new line of defense. They would have this court accept the proposition that these two skilled and experienced criminal defense counsel, nine months after undertaking the responsibility for their representation and within days of trial, first thought of, or worse yet, first had brought to their attention the "unique" defense that "my client did not do it, someone else did." We decline the invitation.

It was within the district court's discretion to deny this eleventh hour tactic which it viewed as nothing more than an effort to delay the trial. See McCoy v. Cabana, 794 F.2d 177 (5th Cir. 1986)(denial of last minute request for continuance to retain new counsel is within court's discretion); see also United States v. Punch, 722 F.2d 146, 151 (5th Cir. 1983)(recognizing that conflict of interest may be used as a delay tactic); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)(same). Cf. Fed.R.Crim.P. 44(c) (Garcia-type hearings required only where counsel represents defendants jointly charged or joined for trial). We conclude that under all of these circumstances, the trial judge's decision to give the Varcas the option to proceed with their counsel or to proceed pro se was an appropriate exercise of his discretion.

2. Pre- and Post-Indictment Delay

[3-5] The Varcas contend that the indictment against them should have been dismissed because of a two-year lapse between the date of the offense and the date of their indictment, and an eleven-month lapse between indictment and trial. The district court found the Varcas' motions to dismiss the indictment meritless. We agree. To support a claim of pre-indictment delay, a defendant must proffer more than a simple assertion of prejudice. He must also demonstrate that the delay was intended by the government to gain a tactical advantage. United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). There is no such showing in this record. Nor did the eleven months that elapsed between indictment and trial violate the Varcas' sixth amendment right to a speedy trial. Although such a delay merits scrutiny, we find that it was occasioned by the Varcas'

need for additional time to retain conflict-free counsel, their delay in furnishing discovery material to their attorneys, and their desire to discover and utilize classified information. At no time did the Varcas assert their right to a speedy trial. Under these circumstances, we perceive no constitutional violation. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

3. Evidentiary Rulings Relating to Classified Information

[6-7] Prior to trial the Varcas informed the government that they intended to use classified information which would show that they previously had worked for the CIA in a Caribbean intelligence operation through a contact named Rudolf. A search by the CIA of its records disclosed three classified reports mentioning the Varcas. The district court ruled that the reports were relevant, but

ordered them disclosed in a redacted version eliminating Rudolf's last name and telephone number, and containing a more general, declassified summary of Rudolf's contacts with Anthony Varca in 1963 and 1980.

The Varcas contend that these rulings, made pursuant to the Classified Information Procedure Act (CIPA), 18 U.S.C. App., prevented their access to relevant evidence and curtailed their ability to mount their defense. The CIPA was not, however, intended to expand the traditional rules of criminal discovery under which the government is not required to provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense. See Fed.R.Crim.P. 16; United States v. Yunis, 867 F.2d 617 (D.C. Cir.1989). The information in these reports was already known to Anthony Varca, who was fully capable of explaining the way in which the redacted details might have

aided his defense.[6] That explanation was not forthcoming. The Varcas also object to the district court's refusal to permit testimony relating to their involvement in the CIA's operation in the Bay of Pigs. The court's ruling that this testimony was irrelevant was within its discretion. See United States v. Wilson, 732 F.2d 404 (5th Cir.), cert. denied, 469 U.S. 1099, 105 S.Ct. 609, 83 L.Ed.2d 718 (1984).[7] Such, in any event, would not constitute reversible error. See Fed.R.Crim.P. 52(a).

4. Sufficiency of the Evidence

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[6]The redaction of these reports could not have prejudiced Mark Varca who was not mentioned in them.

[7]The Varcas also object to the court's ruling that Anthony Varca could not testify as to his association with an entity known as "Black Eagle Associates" in the 1940's and 1950's. The court correctly ruled that no events prior to the 1960's could be addressed because proper notice had not been given the government pursuant to § 5 of CIPA. See United States v. Badia, 827 F.2d 1458 (11th Cir. 1987), cert. denied., 485 U.S. 937, 108 S.Ct. 1115, 99 L.Ed.2d 275 (1988).

[8] The Varcas challenge the sufficiency of the government's evidence on two grounds. They assert that the evidence was insufficient to support their conviction under Count Four because the government failed to prove that the boat carrying the marihuana was found within United States customs waters. They also claim that the testimony of the government's witnesses was not credible.

Neither assertion is persuasive. Testimony introduced at trial established that the marihuana boat navigated along the coast and into one of the channels of the Mississippi delta near New Orleans, thus providing a clear jurisdictional basis for the Varcas' conviction on Count Four. Furthermore, the credibility of the witnesses at trial is a matter peculiarly within the province of the jury. United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987)(en banc), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

5. Minimum Eligibility for Parole

[9] Finally, the Varcas assert that the district court erred in ordering, pursuant to 18 U.S.C. § 4205(b)(1), that they not be eligible for parole prior to serving 15 years of their 52-year sentences.[8] Although we have not previously addressed the issue directly,[9]

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[8]Although this statute was repealed as of November 1, 1987 by the Sentencing Reform Act of 1984, it remains applicable to crimes committed before that date.

[9]The courts of appeals that have addressed this question are split. Four circuits have held that section 4205 does not authorize parole dates beyond ten years. See United States v. Hagen, 869 F.2d 277 (6th Cir.), cert. denied, _____ U.S. _____, 109 S.Ct. 3228, 106 L.Ed.2d 576 (1989); United States v. DiPasquale, 859 F.2d 9 (3d Cir. 1988); United States v. Castonguay, 843 F.2d 51 (1st Cir. 1988); United States v. Fountain, 840 F.2d 509 (7th Cir.), cert. denied, _____ U.S. _____, 109 S.Ct. 533, 102 L.Ed.2d 564 (1988), while four circuits have held that district courts may set parole dates amounting to up to one-third of the total sentence. United States v. Berry, 839 F.2d 1487 (11th Cir. 1988), cert. denied, _____ U.S. _____, 109 S.Ct. 863, 102 L.Ed.2d 987 (1989); United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987); Rothgeb v. United States, 789 F.2d 647 (8th Cir. 1986); United States v. O'Driscoll, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1207, 89 L.Ed.2d 320 (1986). We join this latter group.

we have stated that "Section 4205(b) permits the district courts to set that time [of parole eligibility] at any point during the first third of the prison sentence." United States v. Pry, 625 F.2d 689, 692 (5th Cir. 1980), cert. denied, 450 U.S. 925, 101 S.Ct. 1379, 67 L.Ed.2d 355 (1981). We now so hold. We find no error in the district court's order.

The convictions are AFFIRMED.

88-3942

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK A. VARCA and
ANTHONY JOSEPH VARCA,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 7, 5 Cir., 1990, _____F.2d___)

(April 4, 1990)

Before POLITZ, KING and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and The Court having been polled at the request of

one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

United States of America v.

Defendant MARK A. VARCA

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF LOUISIANA

DOCKET NO. CR. 87-465 "D"

COURT REPORTER: Tom Conrad
In the presence of the attorney for the government the defendant appeared in person on this date December 14, 1988

COUNSEL - [X] WITH COUNSEL - Michael Pasano, Esq.

PLEA - [X] NOT GUILTY

FINDING & JUDGMENT - There being a verdict of [X] GUILTY on September 16, 1988 as to all four counts

Defendant has been convicted as charged of the offense(s) of Title 18 USC 2; Title 21 USC 846; 841 (a)(1) Title 21 USC 952; 963; and 955 a(c)

VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCE ACT AS CHARGED IN THE INDICTMENT

SENTENCE OR PROBATION ORDER - Thirteen (13) years as to Count 1, Count 2, Count 3, and Count 4. The sentence imposed as to Counts 2, 3, and 4 are to run consecutively with the sentence imposed for Count 1 for a total of fifty-two (52) years and pursuant to the provisions of Title 18 U.S.C. Section 4205

(b)(1), the defendant must serve a minimum term of fifteen (15) years before he shall become eligible for parole.

SPECIAL CONDITIONS OF PROBATION- IT IS FURTHER ORDERED that the defendant is fined $125,000.00 on each Count for a total fine of $500,000.00.

IT IS FURTHER ORDERED, that pursuant to Title 18 U.S.C. Sec. 3013, special assessment is imposed in the amount of $200.00.

ASSESSMENTS AND FINES TO BE PAID TO THE OFFICE OF THE CLERK.

SIGNED BY
[X] U.S. District Judge

/s/_____

Date December 14, 1988

United States of America v. Defendant ANTHONY JOSEPH VARCA

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF LOUISIANA

DOCKET NO. CR. 87-465 "D"

COURT REPORTER: Tom Conrad
In the presence of the attorney for the government the defendant appeared in person on this date December 14, 1988

COUNSEL - [X] WITH COUNSEL - Michael Pasano, Esq.

PLEA - [X] NOT GUILTY

FINDING & JUDGMENT - There being a verdict of [X] GUILTYon September 16, 1988 as to all four counts

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SIGNED BY
[X] U.S. District Judge

/s/_____

Date December 14, 1988

No. 89-1921

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTHONY J. VARCA AND MARK A. VARCA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioners' request, made on the eve of trial, to remove their attorneys for an alleged conflict of interest.

2. Whether 18 U.S.C. 4205(b)(1), which was repealed as of November 1, 1987, gave the district court authority to direct that petitioners serve 15 years of their 52-year sentences before becoming eligible for parole.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 896 F.2d 900.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. A petition for rehearing was denied on April 4, 1990. Pet. App. 22-23. The petition for a writ of certiorari was filed on June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were con-

victed of conspiring to import 51,210 pounds of marijuana (Count 1), in violation of 21 U.S.C. 952 and 963; attempting to import marijuana (Count 2), in violation of 21 U.S.C. 952 and 963; conspiring to possess marijuana with intent to distribute it (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846; and possessing marijuana in Customs waters with intent to distribute it (Count 4), in violation of 21 U.S.C. 955a(c). They were sentenced to consecutive terms of 13 years' imprisonment on each count. Pursuant to 18 U.S.C. 4205(b)(1) (1982), petitioners were ordered to serve a minimum of 15 years' imprisonment before they would be eligible for parole. In addition, petitioners were each fined $500,000. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial showed that petitioners – father and son – owned and operated numerous vessels in Florida. In 1984, they agreed to supply Randy Fink with a ship, the *Ocean Crown*, which would be used to import 60,000 pounds of marijuana from Colombia. They also helped Fink launder the funds to finance the venture through a bank in the Cayman Islands. Fink agreed to divide with petitioners the $6 million that he expected to earn from the sale of the marijuana. In November 1984, petitioner Mark Varca captained the *Ocean Crown* as he and his crew sailed for Colombia. The ship sank before it reached South America, and Mark and his men were rescued and returned to Florida. Gov't C.A. Br. 3-4, 9.

In 1985, petitioners supplied Fink with three ships to pick up the marijuana – one ship to carry the contraband and two ships to serve as decoys. Petitioners directed the vessels from Florida. The *Blue Star* picked up the marijuana off the coast of Colombia. At petitioners' direction, the marijuana was then transferred to another ship, the *MacVie*. The *Blue Star* and a third vessel, the *Island Venturer*, then led the *MacVie* through the Yucatan straits toward New

Orleans. Fink and his men were waiting in New Orleans to receive the contraband. Gov't C.A. Br. 4-8.

While the ships were at sea, petitioners attempted to buy a piece of property near New Orleans with deep water access that could be used as an offloading site for the marijuana. When the sale could not be completed in time, Fink instead used a site recommended by two corrupt U.S. Customs agents. Meanwhile, the FBI infiltrated Fink's organization. In August 1985, while the marijuana was being transferred from the *MacVie* to a shrimp boat near the Mississippi delta, the FBI arrested many of the participants in the smuggling scheme, including Fink and the crews of two of petitioners' vessels. Upon learning of the arrests, petitioners fled their homes in Ft. Lauderdale, Florida. They were not apprehended until October 1987. Gov't C.A. Br. 7-10.

2. Following their arrests, petitioners jointly retained James O'Connor to represent them on the smuggling charges. Because O'Connor also represented two co-conspirators who might be called as witnesses at petitioners' trial, the district court advised petitioners of their right to conflict-free counsel and of the perils of joint representation. Petitioners would not waive their right to conflict-free counsel, so the district court disqualified O'Connor and ordered petitioners to find new lawyers. Gov't C.A. Br. 18.

Petitioners eventually retained Arthur Lemann and John Reed. Lemann and a member of Reed's firm also represented the Customs agents, who had been indicted separately from petitioners. The agents had already been tried once but were awaiting a retrial when petitioners retained Lemann and Reed.[1] At the first trial, the agents

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[1] At their first trial, the Customs agents were acquitted on two counts, and the jury could not reach a verdict on the other two. The agents were awaiting a retrial on a superseding indictment. See *United States*

denied that they had any knowledge of the smuggling venture. Gov't C.A. Br. 22.

In December 1987, Lemann informed the district court that he also represented one of the Customs agents.[2] In March 1988, Lemann and Reed asked to withdraw as counsel for petitioners, setting forth their reasons in sealed affidavits.[3] Petitioners objected, explaining to the court that they had selected their new counsel by reading the transcripts of the Customs agents' first trial. Petitioners described their attorneys as "capable" and "excellent," and informed the court that the only problem between them and their counsel was a "money problem." Gov't C.A. Br. 19-20. The district court denied Lemann and Reed's motion to withdraw.

Over the next few months, the district court conducted hearings on petitioners' claim that in August 1985 their ships were on a mission personally authorized by deceased CIA Director William Casey. Gov't C.A. Br. 35-37. On September 12, 1988, the day on which petitioners' trial was scheduled to begin, petitioners proffered for the first time a new theory of defense. They claimed that they had been set up by the Customs agents. Petitioners complained that they had a conflict with their counsel because they wanted

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v. *Deerman*, 837 F.2d 684 (5th Cir.), cert. denied, 109 S. Ct. 146 (1988). At their retrial, the Customs agents were convicted on all counts of the superseding indictment. Gov't C.A. Br. 22-23.

[2] Lemann also advised the district court that John Lawrence, an attorney who had previously rented office space from him, represented yet another co-conspirator, Edward Misseck. Misseck had pleaded guilty and was expected to testify for the government. Lemann advised the court that he had never assisted Lawrence in his representation of Misseck and that he had not shared in Lawrence's fee. Furthermore, Lemann and Lawrence were no longer sharing office space. The district court found no basis for disqualifying Lemann on account of his past association with Lawrence. Gov't C.A. Br. 19.

[3] The government has never seen these affidavits.

to subpoena the agents, who were still awaiting their retrial, as defense witnesses. Petitioners did not at that time ask the court to discharge Lemann and Reed or to appoint different counsel. Gov't C.A. Br. 20-21.

Two days later, after the jury was selected and sworn, petitioners moved to disqualify Lemann and Reed for a conflict of interest. Petitioners acknowledged that the Customs agents would have to incriminate themselves in order to testify in support of their new theory, and that they did not know whether the Customs agents would be willing to waive their Fifth Amendment privilege against compulsory self-incrimination. Petitioners advised the court that they did not want to represent themselves, but instead wanted a continuance to find new counsel. The district court denied petitioners' motions, and they were represented at trial by Lemann and Reed. Gov't C.A. Br. 21.

3. The court of appeals affirmed. The court held that it was "not persuaded that [attorneys Lemann and Reed] had willfully labored under an irreconcilable conflict of interest." Pet. App. 12. The court noted that petitioners had selected Lemann and Reed after having been advised of their right to conflict-free counsel and after having read the transcripts of the Customs agents' first trial. *Ibid.* The court found it hard to believe that Lemann and Reed would not have informed the court of a conflict, if one existed, particularly since they had sought permission to withdraw as counsel. *Id.* at 13. And the court refused to believe petitioners' claim that the alleged conflict "reared its ugly head only on the eve of trial." *Ibid.* The court of appeals thus held that it "was within the district court's discretion to deny this eleventh hour tactic which it viewed as nothing more than an effort to delay the trial." *Id.* at 14.

The court of appeals also affirmed the district court's decision to defer petitioners' parole eligibility until they had served 15 years of their 52-year sentences. Pet. App. 20.

The court held that 18 U.S.C. 4205(b) (1982) permitted the district court to set parole eligibility "at any point during the first third of the prison sentence." Pet. App. 21.

ARGUMENT

1. Attorneys Arthur Lemann and John Reed were not disabled by a conflict of interest. The district court therefore properly denied petitioners' untimely motion to disqualify their attorneys and to postpone the trial until they could obtain new counsel. Contrary to petitioners' claim, the decision below does not conflict with any decision of this Court or another court of appeals. Accordingly, further review of this fact-bound issue is not warranted.

To establish a Sixth Amendment violation, a defendant must show an actual conflict of interest, that is, that "his counsel actively represented conflicting interests." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980). In this case, there was no conflict. The Customs agents were not named in the same indictment as petitioners, and they were not joined for trial with petitioners. See *Burger* v. *Kemp*, 483 U.S. 776, 783-788 (1987) (no conflict where one attorney represented co-defendants who were tried separately). Compare *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (conflict where one attorney represented three defendants in a single trial). Nor did the Customs agents appear as witnesses against petitioners. Indeed, no government witness mentioned the Customs agents at trial, nor did the government allege that petitioners had had any contact with the Customs agents.

Moreover, although both the agents and petitioners participated in the same conspiracy, their roles were very different. Petitioners operated out of Florida, and they controlled the vessels and the crews. The Customs agents stayed

in New Orleans and provided Fink with information through a conduit. In fact, the agents insulated themselves from any direct contact with Fink or any of the other members of the conspiracy. See *United States* v. *Deerman*, 837 F.2d 684 (5th Cir.), cert. denied, 109 S. Ct. 146 (1988). Furthermore, petitioners did not show that the agents would have exculpated them if called to testify. At the time of petitioners' trial, the agents were awaiting their own retrial, and petitioners made no showing that if subpoenaed, the agents would have forgone their Fifth Amendment privilege and incriminated themselves by testifying that they collaborated with Fink to set up petitioners. This scenario is particularly unlikely since at their first trial the Customs agents had denied that they had any knowledge of the smuggling venture. See *United States* v. *Deerman*, 837 F.2d at 687-688.

The district court was well acquainted with the history of this case and could determine without a hearing that petitioners' eleventh-hour conflict claim was bogus. Although nine months had passed since petitioners hired Lemann and Reed, and although petitioners knew from the outset that their attorneys also represented the Customs agents, they waited until the commencement of trial to allege that the Customs agents were somehow relevant to their defense.

A district court does not have to conduct an inquiry into every frivolous allegation of a conflict of interest. See *Cuyler* v. *Sullivan*, 446 U.S. at 346-347 (Sixth Amendment does not require trial court to initiate inquiry into the propriety of multiple representation in every case). In this case, in particular, there was no need to ask the views of either defense counsel or the prosecutor on the conflict issue. *Id.* at 347 ("trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel"). Lemann and Reed had previously moved to withdraw as petitioners' counsel; had they thought that their representation of the Customs agents created a conflict, they surely

would have adverted to the conflict in support of their motion. Likewise, the prosecutor undoubtedly would have sought Lemann and Reed's disqualification at the outset, as he did with O'Connor, if the prosecutor had seen any possible conflict of interest.

This Court has recognized that last-minute conflict claims are sometimes raised to delay or disrupt trial, and that the trial court must be able to deal with a defendant who resorts to such tactics. *Holloway* v. *Arkansas*, 435 U.S. 475, 486-487 (1978). Under the circumstances, the trial court was justified in finding the claim of conflict to be pretextual. The trial court therefore acted within its authority in denying petitioners' last-minute motions to discharge their attorneys and for a continuance.

The cases on which petitioners rely do not conflict with the decision below. Those cases merely hold that where there is an actual conflict of interest, the trial court must conduct a hearing to determine whether the defendant wishes to waive his right to conflict-free counsel. See, *e.g.*, *United States* v. *Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989) (actual conflict where defense counsel previously prosecuted the defendant for predicate felonies); *Fitzpatrick* v. *McCormick*, 869 F.2d 1247, 1251-1253 (9th Cir. 1989) (actual conflict where the same attorney represented a co-defendant in the first murder trial, the defendant claimed that the co-defendant committed the murder, the co-defendant denied it, and defense counsel believed the co-defendant and refused to pursue that defense); *United States* v. *Lawriw*, 568 F.2d 98, 101-105 (8th Cir.) (actual conflict where one attorney represented co-defendants in a joint trial), cert. denied, 435 U.S. 969 (1978); *Singley* v. *United States*, 548 A.2d 780, 784 (D.C. 1988) (actual conflict where defense counsel previously represented a government witness). The Fifth Circuit has a similar requirement, see *United States* v. *Garcia*, 517 F.2d 272, 278 (1975), yet it found no viola-

tion in this case because there was no actual conflict of interest and because petitioners were advised of the perils of multiple representation before they retained Lemann and Reed. Accordingly, petitioners have not shown that their claim would have succeeded in any court of appeals.

2. Petitioners also contend (Pet. 34-45) that the district court lacked authority to provide that they would be ineligible for parole for 15 years. In ordering that petitioners would not be eligible for parole for the first 15 years of their 52-year sentences, the district court relied on 18 U.S.C. 4205(b)(1) (1982), which provided that a sentencing judge could designate "a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." The court of appeals agreed that Section 4205(b)(1) authorized the 15-year parole sentence. Relying on a different provision, 18 U.S.C. 4205(a) (1982), four courts of appeals have held that judges sentencing under the pre-1987 federal sentencing scheme could not mandate a no-parole period of more than ten years, no matter how long the sentence that the court imposed. See *United States* v. *Hagen*, 869 F.2d 277 (6th Cir.), cert. denied, 109 S. Ct. 3228 (1989); *United States* v. *DiPasquale*, 859 F.2d 9 (3d Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir. 1988), cert. denied, 109 S. Ct. 533 (1988). Four other courts of appeals have agreed with the court below that former 18 U.S.C. 4205(b)(1) authorized the imposition of a minimum term of up to one-third of the maximum sentence, even if that minimum term exceeded ten years. *United States* v. *Parker*, 881 F.2d 945 (10th Cir. 1989), cert. denied, 110 S. Ct. 1141 (1990); *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir.), cert. denied, 109 S. Ct. 863 (1989);

United States v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Despite the conflict in the circuits, this issue is of no continuing importance because Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. The issue therefore affects only the rapidly diminishing and closed set of cases involving prosecutions for criminal conduct completed before November 1, 1987.

Not only is the issue of diminishing importance, but there is nothing about the circumstances of this case that makes the issue a particularly compelling candidate for review as it affects these defendants. Petitioners were sentenced to 52 years' imprisonment, and they are therefore statutorily ineligible for parole for at least ten years. See 18 U.S.C. 4205(a) (1982). In light of the length of their sentences and the nature of their offenses, it is highly unlikely that the Parole Commission would grant petitioners parole before they had served at least 15 years of their sentences. Petitioners had a prominent role in this multi-million dollar smuggling venture; they admitted that much of their business came from drug traffickers (Gov't C.A. Br. 13); and they fled following Fink's arrest and assumed new identities in order to avoid prosecution (see Gov't C.A. Br. 10). Moreover, the no-parole period of petitioners' sentence is consistent with (indeed, more lenient than) the sentences that similarly situated drug smugglers currently receive under the federal Sentencing Guidelines for offenses committed after November 1, 1987. Under the Guidelines, a person who imports more than 100,000 kilograms of marijuana will usually

be sentenced to at least 24 years' imprisonment, with no opportunity for parole. Sentencing Guideline ch. 2, Pt. 2, § 2D1.1 (1989); *id.* ch. 5, Pt. A (sentencing table). The 15-year no-parole portion of petitioners' sentences is therefore unlikely to affect the date of their actual release, and it does not result in forcing them to serve a disproportionate term of imprisonment. Consequently, further review of petitioners' sentence is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

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Respondent.

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THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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In The
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PETITIONERS' REPLY BRIEF

ARGUMENT

I. WHERE THE TRIAL COURT WAS EXPRESSLY MADE AWARE BEFORE TRIAL THAT ATTORNEYS LEMANN AND REED HAD UNACCEPTABLE CONFLICTS OF INTEREST, THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE CONFLICTS OR TO CONDUCT A GARCIA HEARING VIOLATED THIS COURT'S SETTLED PRECEDENTS

The Government in its brief in opposition raises various collateral arguments

in an attempt to obfuscate the real issue at the core of the conflicts of interest aspect of this case.[1] The Government's arguments do not demonstrate any justification for the lower courts' failure to follow the law of this Court. The critical facts are simple and uncontroverted. The Varcas' trial counsel, Arthur Reed and John Lemann, simultaneously represented customs officials charged in a companion indictment, whose interests were adverse to the Varcas. The Varcas expressly made the trial court aware before trial that their attorneys' conflicts of interest were unacceptable and requested that the trial

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[1]The Government's brief contains various factual inaccuracies and misstatements of the record, which appear primarily in its statement of the facts and concern the alleged narcotics smuggling activity itself. Because the principal issues raised in this Petition do not implicate these facts directly, we will not belabor the issue or waste the Court's time by setting out these misstatements. Our silence here should not, however, be construed to imply that we accept the Government's statement of the facts as accurate, and we reserve the right to contest the Government's alleged "facts" at a later date, if relevant.

court inquire into the conflicts and conduct a Garcia hearing. The district court did nothing and its failure to act in this situation is directly at odds with the settled precedents of this Court. This Court has clearly mandated that once a trial court has been made aware of a possible conflict of interest it must inquire into the conflict and conduct a Garcia hearing. Cuyler v. Sullivan, 446 U.S. 333, 348, 356 (1980). Thus, this Petition should be granted to correct the dangerous precedent set below.

A. The Government Misses The Core Issue In Its Analysis Of The Conflicts Of Interest

The first sentence of the Government's "argument" claims that attorneys Lemann and Reed were not disabled by conflicts of interest. Govt. brief at 7. In support, the Government argues that the customs agents represented by Lemann and Reed were not named in the same indictment as the Varcas and that the customs agents were not called as

witnesses against the Varcas. The Government further argues that if the customs agents had been subpoenaed by the Varcas to trial, the agents would not "have forgone their Fifth Amendment privilege and incriminated themselves by testifying." Govt. brief at 7.

The Government's premise, that there were no actual conflicts of interest, wholly ignores the core issue and the important district court error raised by the Varcas in this Petition. The fundamental error here is the lower courts' failure to recognize that once a trial court has been made aware of conflicts of interest it must inquire into the conflicts and conduct a Garcia hearing. Cuyler, 446 U.S. at 348, 356; Wood v. Georgia, 450 U.S. 261, 272 (1981). See Varca v. United States, Petition For Certiorari (hereinafter "Petition") at 23-25. Accordingly, when a trial court is made aware of conflicts of interest, as in this case, the only remaining issue is whether or not the trial court

conducted conflicts inquiries and Garcia hearings. The issue as to whether or not the conflicts of interest were actual is obviously premature in advance of such an inquiry or Garcia hearing.

Absent any inquiry by the district court of the Varcas' trial counsel or the Varcas themselves,[2] the district court could not know the full nature and scope of the conflicts of interest brought to its attention. Further, because the trial court made no inquiry into the conflicts of interest, it could not know whether the conflicts were actual and would not be able to gauge the effect such conflicts

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[2]The Varcas and their counsel are obviously in the best position to determine whether actual conflicts of interest existed. The Varcas made clear their opinion that the conflicts were unacceptable. The views of the Varcas' counsel on the conflicts issue are unknown because the trial court did not solicit their views as required by this Court. For whatever reason, the Varcas' attorneys did not offer any opinion to the trial court after the Varcas brought the conflicts to the attention of the trial court. It would be improper to let stand the opinion below, which, on the basis of sheer speculation, wrongly interprets such silence to mean there is no conflict. See Petition at 33.

had on the Varcas. Similarly, without the benefit of a conflicts inquiry below, the appellate courts are not in a position to address the extent and effect of the conflicts of interest. Notwithstanding that the Government does not address the fundamental error below, a brief response to the Government's arguments regarding the issue of actual conflicts is appropriate.

The conflicts of interest caused by the simultaneous representation of the Varcas and the customs agents, which were brought to the attention of the trial court, were substantial. The Varcas informed the trial court that they had asked counsel to pursue a defense strategy that would involve discrediting Lemann's and Reed's customs clients and would "require an activity on the part of [the Varcas' counsel] in conflict with their attorneys' efforts on behalf of their customs clients." (R19-8); See Petition at page 17, n. 12.

It makes no difference that the customs agents were not named in the identical indictment as the Varcas. See, e.g., United States v. Martinez, 630 F.2d 361 (5th Cir.)(conviction reversed because defense counsel previously represented client that plead guilty to charges in separate indictment that related to those against current client), cert. denied, 450 U.S. 922 (1981). Similarly, it does not matter that the customs agents were not called as witnesses at the Varcas' trial or that the agents may not have testified as to the Varcas' innocence. See, e.g., Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962). Finally, the argument that the customs agents may not have testified at the Varcas' trial due to fifth amendment concerns is of no merit and is at best pure speculation. The customs agents could have been subpoenaed to trial and forced to assert any privilege in front of the jury and/or asked questions to which the fifth amendment

privilege does not extend. The attorneys' conflicts of interest made such a defense impossible.

As the above analysis demonstrates, this Court has clearly mandated that when a trial court becomes aware of conflict of interests, it shall conduct an inquiry into the conflict and a Garcia hearing. Cuyler, 446 U.S. at 348. Where the trial court knows of a conflict and fails to conduct an inquiry, a reviewing court can presume that there was ineffective assistance of counsel. Cuyler, 446 U.S. at 348. See Petition at page 25, n.19. An inquiry and Garcia hearing are the only means to determine the nature, extent and effect of conflicts of interest and whether the defendant wishes to waive any such conflicts. Not surprisingly, the Government does not and cannot cite any case where the Government prevails on appeal when a trial court has been made aware of conflicts of interest, but failed to make inquiry or hold

a Garcia hearing. No such case existed until the opinion below because such a ruling would directly contradict the decisions of this Court. Accordingly, this Petition should be granted to correct the decision below that is at odds with this Court's established precedents.[3]

II. THIS COURT SHOULD ADDRESS THE IMPORTANT SENTENCING ISSUE AND RESOLVE THE 5-4 SPLIT AMONG THE FEDERAL CIRCUITS

The Government correctly acknowledges that there is a sharp conflict among the Circuits on the proper interpretation of 18 U.S.C. § 4205, but then wrongly contends that the 5 to 4 Circuit split is not significant and that the instant case is not an

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[3]The Government's argument that the trial court properly denied the Varcas' motion, which asked the trial court to inquire of the attorneys as to the conflicts, because the request was "last minute" is wholly without merit. The Varcas timely made the trial court aware of the conflicts in advance of trial. See Petition at 30-31. Moreover, it is never too late to raise the issue of a conflicts of interest. Id.

appropriate candidate for resolution of that split. Both contentions are incorrect.

A. The Split Among The Circuits Has A Continuing Deleterious Effect

The sharp split among the Circuits is terribly significant to the large pool of federal prisoners who, like the Varcas, were denied parole eligibility for more than 10 years. Contrary to the Government's assertions, the harmful effects of the 5-4 split among the Circuits are continuing. Many of the prisoners sentenced within the 5th, 8th, 9th, 10th and 11th Circuits have received very lengthy minimum parole eligibility sentences and will remain in prison for life without even the possibility of parole. See, e.g., United States v. O'Driscoll, 761 F.2d 589 (10th Cir.)(defendant received 300 year sentence and a minimum parole eligibility of 99 years), cert. denied, 106 S.Ct. 1207 (1986).

Moreover, the Government has publicly announced that it wishes to prosecute an expanding number of white collar criminal cases in connection with the savings and loan crisis. Such prosecutions, to a large extent, will involve offense conduct that occurred before November 1, 1987, which is before the reach of the new Federal Sentencing Guidelines. See Petition at 44-45. As such, the parole system will apply to the defendants in this group and they will be susceptible to disparate treatment regarding parole eligibility depending only upon the federal circuit in which they are sentenced.

This Court should decide this major sentencing issue to resolve the rights of all prisoners still serving disproportionate sentences and to correct the ongoing inequity of different sentences in different circuits imposed for the same criminal conviction.

B. This Case Is An Appropriate One To Resolve The 5-4 Split Among The Circuits

Contrary to the Government's assertions, this case is an excellent vehicle for this Court to resolve the severe conflict among the Circuits and the inequity of disparate sentences in different federal courts.

The Government states on page 10 that it is unlikely that the Parole Commission would grant the Varcas parole before they served 15 years. Gov't. brief at 10. Such an assertion is sheer speculation and is irrelevant to whether the Varcas, as a matter of law, are entitled to be eligible for parole after 10 years. In any event, because the Varcas have no prior criminal history, a fair calculation of the Varcas' parole guidelines could be 40-52 months, which is substantially less than their current parole denial for 15 years.

The Government also asserts that the Varcas would have been sentenced to at least

24 years incarceration with no opportunity for parole if they had been sentenced pursuant to the Federal Sentencing Guidelines. Gov't. brief at 10, 11. Again, such a calculation under the Federal Sentencing Guidelines is inapposite to the interpretation of the parole eligibility aspects of Section 4205. In any case, the Government has miscalculated the Varcas' sentencing guidelines. The Government asserts that the Varcas' conviction involved over 100,000 kilograms of marijuana. Gov't. brief at 10. In reality, however, the amount of marijuana charged in the indictment was 51,210 pounds or only 23,277 kilograms. A fair calculation of the sentencing guideline range using the correct quantity of marijuana could be a range of 15 years, 8 months to 19 years, 7 months.

Under the proper interpretation of Section 4205, the Varcas have been denied parole for a period well in excess of that permitted in four Circuits of the United

States. As explained in the Petition at 37-45, those four Courts of Appeal have correctly interpreted the language, legislative history, and policy considerations behind the governing statutes. This is an appropriate case for resolution of that conflict among the badly fractured Circuits and to remedy the injustice inflicted on the large and growing group of other improperly sentenced federal prisoners.

CONCLUSION

For all of the foregoing reasons, and those contained in the Petition, the Varcas respectfully submit that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing were mailed this 20th day of **September, 1990** to The Solicitor General, Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; and one (1) copy to Patty Merkamp Stemler, Attorney, Criminal Division, Appellate Section, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899.

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